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IN THE SUPREME COURT OF THE STATE OF UTAH

LEE R. BARTON,
Plaintiff and Respondent,

— vs. —

DICK CARSON, dba CARSON
TRUCKING COMPANY, et al,
Defendants and Appellants.

Case
No. 9720

FILED

OCT 17 1962

RESPONDENT'S BRIEF

Appeal From the Third District Court
in and for Salt Lake County
HON. STEWART HANSON, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEE R. BARTON,
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RESPONDENT'S BRIEF

NATURE OF CASE

Motion by defendants to strike plaintiff's memorandum of costs and disbursements.

DISPOSITION IN LOWER COURT

The trial court denied defendants' motion to strike plaintiff's memorandum of costs and disbursements.

STATEMENT OF FACTS

Plaintiff will generally accept Appellants' statement of facts, except that portion which is challenged hereafter in plaintiff's argument.

Plaintiff will also further add that on June 11, 1962, a verified memorandum of costs and disbursements was filed in the Clerk's Office of the Third Judicial District Court in Salt Lake County. (R. 7, 8)

ARGUMENT

POINT I.

APPELLANTS HAVE FAILED TO DESIGNATE AS PART OF THE RECORD ON APPEAL EVIDENCE OR PLEADINGS WHICH INDICATE THE DATE JUDGMENT WAS ENTERED AND THE RECORD BEING CONCLUSIVE, THERE IS NO CONTROVERSY BEFORE THE COURT FOR CONSIDERATION AND AN OPINION RENDERED BY THE COURT ON THIS MATTER WOULD BE ADVISORY.

The record on appeal which was designated by appellants for certification to the Supreme Court to sustain the contentions in its brief does not show or otherwise indicate what date judgment was entered by the District Court in this matter, nor does the record show that judgment has ever been entered. Since appellants have failed to designate the judgment, if there be one, there is no controversy before the Court on appeal and that being the case, any opinion rendered by the Court would be strictly advisory in nature.

The Statement of Facts in appellants' Brief indicates that judgment was entered on June 8, 1962, but this is a fact only alleged by appellants and not binding

upon the Court. It is not substantiated by the record and hence cannot be considered in disposition of this matter. *Mary Jane Sterens v. Foley*, 67 Utah 578, 248 Pac. 815; *Evans v. Reiser*, 78 Utah 357, 3 P. 2d 253; *Corma v. Corma*, 80 Utah 486, 15 P. 2d 631. This Court has decided many times that it may not go outside the record to ascertain facts in regard to the case before it.

Appellants are saying to the Court, "Suppose that the matter of *Barton v. Carson* has been tried in the District Court of Salt Lake County, and has concluded, judgment being awarded to the plaintiff and that as part of said judgment costs have been awarded against the defendant. Further assume that the date judgment was entered was June 8, 1962, and also further assume that within five days after the date of entry of judgment that plaintiff did not serve upon defendant a verified memorandum of Costs and Disbursements."

In essence, appellants are asking the Court to rule on validity of the service of an unverified memorandum, yet has not furnished to the Court any indication that a judgment was rendered and the date thereof.

Thus, according to the record, plaintiff may still have time in which to serve a verified memorandum of Costs and Disbursements upon appellants. This being the situation there is no controversy before the Court, therefore, only an advisory opinion may be rendered by the Court.

POINT II.

THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO STRIKE PLAINTIFF'S MEMORANDUM OF COSTS AND DISBURSEMENTS.

Without prejudice as to the preceding argument and in the alternative, plaintiff answers appellants' argument.

"Except when express provision therefor is made either in a statute of the state or in these rules, costs shall be allowed as of course, to the prevailing party unless the Court otherwise directs . . ." *Rule 54(d)(1) Utah Rules of Civil Procedure*. This rule grants to the prevailing party a right to recover his costs. At the common law, recovery of costs was not a right, but since 1884 the prevailing party in this jurisdiction has been granted his costs and disbursements. Section 3695, 2 Comp. Laws 1888.

To further protect this right, a defendant has the right to require security from an out of state plaintiff for costs and charges that may be awarded against plaintiff. Rule 12(j) U.R.C.P.

Thus, recovery of costs has become an established principle in our law.

In this case, a verified memorandum was filed with the Court and a copy of the memorandum was mailed to appellants' attorney. The only question then presented by appellants is whether their Motion to Strike Plaintiff's Memorandum of Csts and Disbursements should

have been granted by the District Court for plaintiff's failure to notarize the copy sent to appellants.

Plaintiff maintains that the filing of a verified memorandum of costs and disbursements, with service of the memorandum, unverified, by mail fulfilled the requirements of the general tenor of the rules and specifically of Rule 54(d)(2) U.R.C.P.

With the acceptance of the Rules of Civil Procedure in 1950, this jurisdiction adopted "notice-type" pleadings. The primary idea behind the rules being to simplify our previous technical rules of pleadings. To accomplish this the Rules decree that they be liberally construed to insure a just, speedy and inexpensive determination of each cause of action, Rule 1(a) U.R.C.P.

The question before the Court at this time is novel and of first impression. This is because no other state has in its Rules a provision exactly like our Rule 54(d)(2).

In *Pioneer Title Insurance Co. v. Guttman*, 345 P. 2d 577, at Page 581, the California Appellate Court considering the provisions of Section 1033 of the California Civil Procedure Code allowed an irregularity in regard to a premature service of the cost memorandum and held that the section should be liberally construed. Section 1033 is very similar to our Rule 54(d)(2) and may have served as a form for the committee which drafted our Rules.

Appellants allege that Rule 54(d)(2) dictates that two verified memorandums be made. This Court decided

in *Walker Bank and Trust Co. v. New York Terminal Warehouse Co.*, 10 Utah 710, 350 P. 2d 626, that failure to verify a memorandum of costs and disbursements will defeat the prevailing party's right to his costs. But this is not the question before us at the present time.

The purpose of the verification as required by Rule 54(d)(2) is to assert to affiants knowledge that the costs and disbursements listed were actually expended in the case. Therefore, notarization of the memorandum sent to the adverse party would be superfluous. The purpose of the verification of the memorandum is to establish a prima facie case that the contents therein are proper and true. *Jeffers v. Screen Extras Guild*, 134 Ca2d 622, 286 P. 2d 30. This being the case, verification of 100 copies of the memorandum of costs would not change the legal significance of the verified original memorandum of costs which is filed with the Court.

The requirements of service of a memorandum of costs upon an adverse party is to give notice of the costs that the prevailing party expects to recover. The verification created a prima facie case that items were proper and correct. The purpose of Rule 54(d)(2) has, therefore, been accomplished. Appellants have not been prejudiced in any way.

Appellants do not challenge the correctness of the items listed by plaintiff, for he did not motion to tax the costs, but instead he made a motion to strike the entire

cost bill based upon an alleged technicality in the rules of procedure.

CONCLUSION

Appellants have failed to designate in their record on appeal any indication that judgment has been entered, or if entered, what date so entered. This Court being bound by the record before it can at this time render but an advisory opinion in regard to the validity of the memorandum.

As has been pointed out, the prevailing party's rights to recover his costs has been well established, first by the legislature and since 1950 by the Rules of Civil Procedure. Plaintiff's only duty to exercise this right is to properly assess the costs and disbursements by complying with Section 54(d)(2) of the Utah Rules of Civil Procedure. This plaintiff has done. A verified memorandum was filed with the Court, thus establishing a *prima facie* case, that all items contained therein were proper and correct expenditures. Appellants were served with an unverified memorandum which gave him notice of plaintiff's demands in regard to appropriate costs and disbursements in the case.

When two parties proceed to trial, they well understand that should they lose, they shall have to pay the prevailing party's costs. Appellants are now trying to avoid payment of the costs in this case by pleading a possible technicality resulting from unclear language in the Rules.

It was for this purpose that the Utah Rules of Civil Procedure were adopted. It is the express purpose that they be liberally construed to effect speedy and inexpensive justice. Plaintiff has complied with the Rules in this case, therefore, Appellants' Motion to Strike was properly denied by the District Court and that decision should be affirmed by this Honorable Court.

Respectfully Submitted,

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